

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
FILED

OCT 5 2005

ANTHONY CARDELL HAYNES,

Petitioner,

-VS-

DOUG DRETKE, Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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MICHAEL N. MILBY, CLERK OF COURT

MISCELLANEOUS NO. H-04-319
Judge Sim Lake

H - 05 - 3424

PETITION FOR WRIT OF HABEAS CORPUS

VOLUME I
PAGES 1-149

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ANTHONY CARDELL HAYNES,

§

§

Petitioner,

§

§

-VS-

§

MISCELLANEOUS NO. H-04-319

§

Judge Sim Lake

**DOUG DRETKE, Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,**

§

§

§

§

Respondent.

§

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Petitioner Anthony Cardell Haynes is currently confined in the Polunsky Unit of the Texas Department of Criminal Justice, Livingston, Texas, in the custody of the Respondent, Doug Dretke, Director of the Correctional Institutions Division of the Texas Department of Criminal Justice. Mr. Haynes is confined in violation of the Constitution and laws of the United States, and files this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 *et. seq.* in order to secure the reversal of his capital murder conviction and sentence of death, and for his release from confinement.

In support thereof, Mr. Haynes would show the following:

I.

JURISDICTION AND PROCEDURAL HISTORY

Mr. Haynes invokes the jurisdiction of this Court pursuant to 28 U.S.C. §2254 *et. seq.* Petitioner is a citizen of the United States and a resident of the State of Texas, and is incarcerated in the custody of Respondent.

On May 29, 1998 a complaint was filed in Harris County District Court No. 263, charging Anthony Haynes with the shooting of Houston Police Department Officer Kent Kincaid. CR 2¹ (Exhibit 1). On July 22, 1998 an indictment was filed against Mr. Haynes, charging him with capital murder in the shooting of Officer Kincaid. CR 7 (Exhibit 2). Jury selection began on August 16, 1999 in the 263rd District Court of Harris County, Texas. Testimony in the matter began on September 13, 1999. Guilt/innocence phase closing arguments were made on September 17, 1999. On that date, the jury found Mr. Haynes guilty of capital murder in Cause No. 783872 before the 263rd Judicial District Court of Harris County, Texas (CR 477-478; Exhibit 3), and on September 24, 1999, in accordance with the special issues submitted pursuant to Tex. Code Crim. Pro. Article 37.07, was sentenced to death. (*Id.*) On November 12, 1999, after a hearing, the trial court denied a motion for a new trial. On September 29, 1999 Mr. Haynes, through counsel, filed a Notice of Appeal. CR 480.

Petitioner, through appointed attorney Leora Teicher Kahn, filed his direct appeal in

¹ “CR” will refer to the Clerk’s Record in this matter, in three volumes, as filed with the Texas Court of Criminal Appeals on appeal.

the Texas Court of Criminal Appeals on June 2, 2000. (Exhibit 4).² Petitioner's appeal of this conviction and death sentence was denied by the Texas Court of Criminal Appeals on Oct. 10, 2001. *Haynes v. State*, No. AP-73,685 (Tex. Crim. App. Oct. 10, 2001)(slip op.)(not designated for publication)(Exhibit 5).

Petitioner, through appointed counsel Richard Wheelan, timely filed his petition for state habeas corpus relief with the 263rd Judicial District Court of Harris County, Texas on February 15, 2001. (Exhibit 6). On August 2, 2004, Mr. Haynes submitted his proposed findings of fact and conclusions of law (Habeas Tr. 139-143), and on August 3, 2004, the State submitted their proposed findings and conclusions. (Habeas Tr. 147-162). On August 5, a mere two days after they were submitted, the trial court adopted verbatim the State's proposed findings, without so much as altering a comma. (*Id.*; Exhibit 7). On October 6, 2004, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions and denied his state habeas application. *Ex Parte Anthony Cardell Haynes*, No. 59,929-01(not designated for publication) (Exhibit 8).

Undersigned counsel was appointed as counsel for Mr. Haynes in this Court on October 22, 2004. Mr. Haynes is proceeding *in forma pauperis* in these proceedings. This is Mr. Haynes's first application for federal habeas corpus relief.

This petition is timely filed, as it filed within one year of the state court's denial of his

² Petitioner has no official page numbering for this document, and his motion to be furnished with a copy of the record filed by the State was denied.

habeas application on October 6, 2004.³

II.

FACTUAL BACKGROUND

A) Introduction.⁴

On May 22, 1998 Anthony Haynes was a Houston teenager and a recent high school graduate with no criminal record whatsoever, who dreamed of attending college and a military career. Anthony's parents had provided a strict but loving environment for their son, who was well liked and admired by both family, relatives and friends. He was seen by them as having an essentially happy-go-lucky attitude toward life, and was respectful toward his family and authority. He was the last person his loved ones expected to commit a tragic act of violence that would end the life of a Houston police officer.

In 1997, Anthony graduated from Dulles High School in Sugar Land, in the Houston area, and then enrolled in the Navy Boost Program in Rhode Island. This program was designed for students who had excelled in high school ROTC and were thinking of a career in the Navy, possibly with a view to acceptance in the United States Naval Academy. Anthony liked the discipline and routine of the military, had excelled in high school ROTC,

³ See Exhibit 8, Order of the Texas Court of Criminal Appeals, *Ex Parte Anthony Cardell Haynes*, No. 59,929-01, October 6, 2004.

⁴ This factual summary introduction has been compiled from the record and from the numerous declarations which accompany this petition attached hereto as exhibits. The factual summary of the trial following this introduction has been compiled from the testimony and evidence introduced at trial, and is not intended as an admission by Petitioner of the veracity of any of this testimony or evidence.

and he tried hard to succeed in the Boost Program.

Unfortunately, he did not quite make the grades he needed, and had to return home to Houston. This, the first major failure in his life, triggered a number of events that were to have tragic consequences for two families. He lost a scholarship to Morehouse College, an offer he had been very proud of. More seriously, he began to experiment with drugs. On the night of May 22, 1998, Anthony had for the first time in his life taken a particularly dangerous drug, crystal methamphetamine ("crystal meth"). The potent effects of the drug caused him to lose all sense of himself and his ability to make measured judgments and led him to become involved in a number of acts that would eventually land him on death row.

Anthony first sampled the crystal meth around May 20, and for several days after that, he could not sleep, but instead wandered around Houston in a manic state, randomly visiting friends, without any plans or purpose. On May 22, 1998, Anthony got together with two friends, one of whom, Tim Reese, had a significant history of delinquent behavior. They drove around Houston in a pickup registered in his father's name. They decided to raise some money and drove up to pedestrians, pretended to ask directions, and then pointed a gun at them. The gun was not fired and the victims who refused to hand over their wallets and ran away were not pursued or fired upon. The unplanned and amateurish nature of these mostly unsuccessful robberies attests to the potent influence of the crystal meth on Anthony by this time.

Later that evening, Anthony fired the pistol into the air as he drove. The bullet came down on the windshield of off-duty Houston Police Department officer Kent Kincaid's SUV,

shattering it. The off-duty officer, who was on his way to a sports bar accompanied by his wife, was understandably irate and thought someone had thrown an object at his vehicle's windshield. He turned around and followed Anthony's truck until it turned into a driveway. The officer, dressed in plain clothes in a vehicle without any police markings, pulled up and blocked the driveway, jumped out and angrily confronted Anthony, who was holding the pistol on his lap. As the off-duty officer reached behind to pull out his identification in the back pocket of his pants, Anthony, fearing he was going to be shot, fired his pistol once. Anthony did not know the victim was a police officer when he fired.

Anthony was soon arrested and charged with the murder of Officer Kent Kincaid. It was charged as a capital crime, after Anthony was coerced into making statements about the killing that were not true, and the officer's status was later made to appear as if he was on duty. Anthony's family initially hired private counsel to represent their son, but this soon proved too expensive and the first attorney and another were eventually appointed by the court.

Unfortunately, these attorneys did little to defend Anthony at either the guilt or the punishment phase of his trial. Relying almost totally on the fact that the officer was off-duty at the time of his death, and the defense theory that this meant the shooting was not a capital crime, many crucial details were not investigated or pursued.⁵ Despite a wealth of mitigating

⁵ As the Texas Court of Criminal Appeals recognized, the crucial question was not whether or not the officer was on-or-off-duty, but whether "he was acting in the lawful discharge of his official duties as a peace officer at the time of his murder." Exhibit 5, *Haynes v. Texas*, No. 73,685, at 2. The CCA ruled that "[t]he record establishes that Sergeant Kincaid ...was off-duty at the time of his death." *Id.* at 3. There is a discrepancy between this holding and the

evidence, and a huge number of important witnesses who were eager to testify, the punishment phase was almost an afterthought. Many family members were never interviewed, and even when they volunteered to testify, their help was inexplicably refused.

This was especially prejudicial, because the State's case for Anthony's probability of committing future acts of criminal violence was especially weak, as he had no prior arrests or police contacts of any kind. The almost complete lack of any indications of a high probability of his committing future acts of criminal violence can be seen by the State's resort to minor disciplinary incidents in high school, amounting to verbal altercations, to bolster their case as to this special issue. Even these incidents could have been effectively challenged, but, due to the deficient investigation, they never were. The robberies immediately prior to the shooting were also introduced as aggravating evidence, but the jury was never told about Anthony's drug use that night that was the precipitating factor in these incidents.

Although the State's case for the probability that Anthony would commit future acts of criminal violence was extraordinarily weak, Anthony's attorneys never effectively challenged it, even though they had a lot of material to work with. As this petition will show, there were literally dozens of family and friends who could have testified about Anthony's non-violent nature, his good deeds in the community, his willingness to help others and other facets of his good character. This information was made available to the attorneys, and Anthony's parents compiled long lists of people who wanted to help. Yet,

testimony of Assistant Chief Stewart of the HPD.

tragically, this help was ignored, and Anthony's punishment phase trial was a non-event. The jury never received a picture of him for what he really was and is: a young man who made a tragically bad decision one night, but who never intended to kill anyone, who did not know the person who approached him was a police officer (who was not acting in the course of his official duties); whose statements were coerced by the police, and who does not deserve to be on death row. Capital punishment is reserved for the worst of the worst. Anthony Haynes simply does not qualify.

B) Pre-trial motions and jury selection.

The main theory of the defense was that the victim was not an on-duty police officer at the time of his death. In pre-trial motions on September 10, 1999, the defense requested records from the Houston Police Department relating to the general orders and rules for police officers, "which would tend to prove or disprove whether or not Mr. Kincaid was in the actual performance of his duties at the time of the alleged offense." 21 RR 4-5.⁶ Also sought were records indicating whether workmen's compensation benefits were being paid to Officer Kincaid's wife, as they would tend to show whether the officer was acting within the lawful discharge of his duties when he was killed. 21 RR 7. The Court ordered such records to be furnished to the defense. *Id.* Also requested was the personnel file of the officer, as to reprimands or evaluations. There had also been some information that immediately prior to the incident, the off-duty Sergeant Kincaid and his wife were partying

⁶ "RR" will refer to the Reporter's Record (trial transcript) in this matter, with the volume number preceding and the page number following.

with another couple who they had agreed to meet later at a sports bar, which would indicate he was not on duty at the time in question and not acting in his official capacity when he stopped the defendant. On September 13, 1999, the Court⁷ ordered that the defense be provided with a copy of the deceased officer's workmen's compensation records regarding this incident. 21 RR 11.

Jury selection began on September 13, 1999. 22 RR 3. The defense used all of its peremptory strikes and was granted two additional strikes. 22 RR 11. It was denied an additional requested strike. 22 RR 12.

At the end of the jury selection process, the defense made a motion pursuant to *Batson v. Kentucky*, stating that of the 50 jurors in the pool, seven were of African-American origin, six of which were reached by the process. 22 RR 13-14. Twanna Kirling, Melba Goodman and Betty Owens were black females who were struck by the prosecution, and L. V. McQueen was a black male that was struck by the prosecution. 22 RR 15. Three of the prosecution's fifteen strikes were used against black veniremen, and only one black person remained on the jury. 22 RR 15-16.

In stating its reasons for eliminating the African-American potential jurors, the prosecutor stated that Ms. Twinna Kirkling was struck because she said capital punishment was a last resort, "and would never give a firm conviction." 22 RR 16. She also saw capital punishment as a necessary evil, she avoided giving any direct position on it, and "since she

⁷ The presiding judge was Hon. Jim Wallace, who presided over the trial, while the voir dire was presided over by Judge Lon Harper. 22 RR 16.